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FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6773
COMPLAINT FILED: Jan. 13, 2014
LAST RESPONSE RECEIVED: Feb. 20, 2014
ACTIVATED: March 10, 2014

EARLIEST SOL: Jan. 1, 2018
LATEST SOL: June 30, 2018
ELECTION CYCLE: 2014

COMPLAINANT: Rick Weingard

RESPONDENTS: Brian Nestande
Nestande for Assembly 2012
Brian Nestande Officeholder Committee,
Assembly 2012
Nestande for Congress and David Bauer in his
official capacity as treasurer

RELEVANT STATUTES 2 U.S.C. § 434(b)
AND REGULATIONS: 2 U.S.C. § 441i(e)
11 C.F.R. § 110.3(d)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Brian Nestande is both a member of the California State Assembly and a candidate for the U.S. House of Representatives from California's 36th Congressional District. The Complaint in this matter alleges that Nestande and Nestande for Congress ("Federal Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by accepting non-federal funds and in-kind contributions from two committees associated with Nestande's role as a state Assemblyman: Nestande for Assembly 2012 ("State Campaign Committee") and Brian Nestande Officeholder Committee, Assembly 2012 ("State Officeholder Committee"). The Complaint

1 further alleges that the Federal Committee violated the reporting provisions of the Act by failing
2 to disclose these in-kind contributions from the state committees.

3 Respondents deny the allegations, asserting that the state committee expenditures at issue
4 were not related to Nestande's exploration of federal candidacy, but rather to his duties as a state
5 officeholder. The Response does not, however, address the alleged in-kind contribution resulting
6 from the transfer of a State Campaign Committee mailer to the Federal Committee.

7 As disoussed below, we recommend that the Commission find no reason to believe that
8 Respondents violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding specific
9 disbursements made by Nestande's two state committees, and dismiss the allegation that the
10 State Campaign Committee, the Federal Committee, and Nestande violated 2 U.S.C. § 441i(e)(1)
11 and 11 C.F.R. § 110.3(d) regarding an alleged in-kind contribution resulting from the transfer of
12 the mailer. We further recommend that the Commission dismiss the allegation that the Federal
13 Committee violated 2 U.S.C. § 434(b), and close the file in this matter.

14 II. FACTUAL AND LEGAL ANALYSIS

15 A. Factual Background

16 The State Campaign Committee first qualified as a state political committee under the
17 California Code, thus triggering registration and semi-annual reporting requirements with the
18 California Fair Political Practices Commission ("CFPPC"), on December 16, 2010.¹ During the
19 2012 election cycle, it raised a total of \$354,432 and spent a total of \$339,270. *See* Nestande for
20 Assembly 2012 CFPPC Semi-Annual Statement at 3 (Jan. 26, 2013). During the current election

¹ Under California law, a committee is any person or combination of persons who directly or indirectly receives contributions of \$1,000 or more during a calendar year, makes independent expenditures of \$1,000 or more during a calendar year, or makes contributions of \$10,000 or more to or at the behest of candidates or committees during a calendar year. Cal. Gov't. Code, § 82013. Committees must file Statements of Organization with the CFPPC within ten days of becoming a committee, Cal. Gov't. Code § 84101, and file semi-annual reports disclosing their financial activity. Cal. Gov't. Code § 84200. Although the State Campaign Committee acknowledges that it qualified as a committee under the California Code as of December 16, 2010 — and filed the appropriate statements with the CFPPC from that date forward — it did not file its Statement of Organization with the CFPPC until December 27, 2013. *See* Nestande for Assembly 2012 CFPPC Statement of Organization (Dec. 27, 2013).

1 cycle, it raised no funds and spent \$140,647 through December 31, 2013. *See* Nestande for
2 Assembly 2012 CFPPC Semi-Annual Statement at 3 (Jan. 31, 2014).

3 California law allows an elected state officer to establish an "officeholder controlled
4 committee" separate from his campaign committee. *See* Cal. Gov't. Code § 18531.62. Such
5 officeholder committees must file statements and reports with the CFPPC in the same manner as
6 campaign committees. *Id.* § 18531.62(c)(3). On May 15, 2013, the State Officeholder
7 Committee received its first contribution, consequently qualifying as a committee under
8 California Code. *See* Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-
9 Annual Statement at 4 (July 31, 2013); Amended Statement of Organization (Dec. 27, 2013).²
10 The State Officeholder Committee raised \$25,134 and spent \$17,195 through December 31,
11 2013. *See* Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-Annual
12 Statement at 3 (Jan. 31, 2014).

13 During the current election cycle, the expenditures made by the State Campaign
14 Committee and the State Officeholder Committee include:

15 Table 1. State Campaign Committee Expenditures, January-June 2013

Expenditure Code: Campaign Consultants		
Date	Payee	Amount
1/4/13	Jennifer Urquiza	\$1,500
1/30/13	Lupe Watson	\$1,000
3/20/13	The Cullen Group, LLC	\$2,000
4/3/13	Alan Denz	\$2,500
4/10/13	Marc Troast	\$5,000
Total:		\$12,000
Expenditure Code: Voter Registration		
Date	Payee	Amount
4/10/13	Republican Organizing Committee	\$2,500
5/23/13	American Express	\$5,550
Total:		\$8,050

² The committee's initial Statement of Organization does not appear to be available online. Its Amended Statement of Organization, however, confirms that it qualified as a committee on May 15, 2013.

Expenditure Code: Radio Airtime and Production Costs		
Date	Payee	Amount
5/7/13	The Battin Group	\$9,000
Total:		\$9,000
Expenditure Code: Candidate/Staff/Spouse Travel, Lodging, Meals [Memo: Travel to Washington, DC, Dec. 16-17, 2012]		
Date	Payee	Amount
—	American Airlines	\$1,740.40
—	Marriott International	\$939.96
—	Capital Grille	\$219.80
Total:		\$2,900.16

1 See Nestande for Assembly 2012 CFPPC Semi-Annual Statement (July 31, 2013); *see also*
 2 Nestande for Assembly 2012 "Expenditures Made," [http://cal-](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1334108&view=expenditures)
 3 [access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1334108&view=expenditures](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1334108&view=expenditures)
 4 (California Secretary of State online system allowing committee disclosure data to be displayed
 5 and sorted by various categories and also providing dates of expenditures).

6 Table 2. State Officeholder Committee Expenditures, January-June 2013

Expenditure Code: Campaign Consultants		
Date	Payee	Amount
6/2/13	Rob Flanigan	\$675.00
6/11/13	Rob Flanigan	\$1,185.00
Total:		\$1,860.00

7 See Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-Annual Statement
 8 (July 31, 2013); *see also* Brian Nestande Officeholder Committee, Assembly 2012
 9 "Expenditures Made," [http://cal-](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1356179&view=expenditures)
 10 [access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1356179&view=expenditures](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1356179&view=expenditures) (providing
 11 dates of expenditures).

12 On April 18, 2013, Nestande filed his Statement of Candidacy for the U.S. House of
 13 Representatives. Brian Nestande Statement of Candidacy (Apr. 18, 2013). The Federal

³ While these expenditures were disclosed on the committee's Semi-Annual Statement covering January through June 2013, the committee paid for this expenditure via its American Express credit card and therefore the exact date of payment was not reported. *See* Nestande for Assembly 2012 CFPPC Semi-Annual Statement at 29-30 (July 31, 2013).

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1 Committee filed its Statement of Organization on April 15, 2013, naming David Bauer as its
2 treasurer. Nestande for Congress Statement of Organization (Apr. 15, 2013). Its first report filed
3 with the Commission disclosed two contributions and one expenditure — totaling \$4,598.93 and
4 \$1,998.93, respectively — made prior to April 18, 2013, during Nestande's testing the waters
5 period. Amended 2013 July Quarterly Rpt. at 6, 34, 45 (Aug. 8, 2013). The Federal Committee
6 raised a total of \$396,729 and spent \$273,988 through the period ending March 30, 2014.
7 Nestande for Congress 2014 Apr. Quarterly Rpt. at 3-4 (Apr. 15, 2014).

8 Based on the spending described above, the Complaint alleges that Nestande and his
9 Federal Committee accepted non-federal funds from his two state committees to pay for
10 expenses incurred in connection with his exploration of federal candidacy. Compl. at 1, 3-5.
11 The Complaint notes the state committees' "high level of campaign activity in the first half
12 of 2013" — despite Nestande not being a state candidate in the 2013-2014 election cycle — in
13 comparison to the Federal Committee making "virtually no expenditures" leading up to
14 Nestande's announcement of federal candidacy. *Id.* at 3-4.

15 The Complaint asserts that the state committees' 2013 spending was twice as high as in
16 previous non-election years, specifically pointing to the following expenditures from the first
17 half of that year as evidence of federal campaign activity:

- 18 • \$13,861 for campaign consulting services, including payments to a firm based in the
19 Washington, D.C. area not previously used by the state committee;
20
- 21 • \$8,293 for voter registration activities;
22
- 23 • \$16,649 for radio production and air time costs, which constitutes the first time the state
24 committee incurred radio expenses in a non-election year; and
25
- 26 • \$2,928 for travel, lodging, and meals in connection with a trip to Washington, D.C., "just
27 months before" Nestande filed his Statement of Candidacy. *Id.* at 3.

28 In addition to this spending, the Complaint alleges that the Federal Committee accepted
29 the transfer of an asset from the State Campaign Committee in violation of the Act. *Id.* at 6. The

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1 Complaint states that, "for several months," the Federal Committee's website
2 (www.briannestande.com) included a menu option labeled "Brian Intro" that linked to a PDF of
3 a State Campaign Committee mailer. *Id.* at 4. The mailer, included as an attachment to the
4 Complaint, features several photographs of Nestande and quotes from supporters of his state
5 candidacy, but makes no reference to his federal candidacy. *Id.*, Attach. It also displays the
6 "Nestande for Assembly" logo and a disclaimer stating that the mailer was paid for by Nestande
7 for Assembly 2012. *Id.*

8 Finally, the Complaint alleges that the Federal Committee should have disclosed these in-
9 kind contributions from the state committees on its regular disclosure reports. *Id.* at 6. By
10 failing to do so, the Federal Committee allegedly violated the reporting provisions of the Act. *Id.*

11 Respondents filed a collective response denying the allegations and asserting that every
12 expenditure by the state committees "was properly and legally spent" in compliance with
13 California law and that "[n]one was for a federal campaign purpose." Resp. at 1.⁴ The Response
14 also specifically addresses the expenditures alleged to have been made for exploratory campaign
15 purposes. With regard to these expenditures, Respondents maintain that:

- 16 • The campaign consultants were "properly compensated for services related to state
17 political and legislative advice and research, and for providing additional professional
18 services to Nestande's state campaign committee for officeholding expenses in his role as
19 an elected state legislator." *Id.* at 2.
- 20 • The state committees made one \$2,500 payment to the Riverside County Republican
21 Party Voter Registration Committee, where there "are competitive state legislative
22 districts." *Id.* at 2-3.
- 23
- 24

⁴ Counsel for Respondents has confirmed that the statements made in the Response apply to both the State Campaign Committee and the State Officeholder Committee, and that the omission of the latter committee was a drafting error.

- The expenditures for radio production and air time were for the purpose of promoting the Assembly's Salton Sea license plate legislation; they encouraged students to compete to design the plate. None of the radio expenditures were public communications, contained express advocacy, or identified Nestande as a potential or actual candidate for federal office. *Id.* at 2.
- Nestande traveled to Washington, D.C., to meet with Members of Congress "to find champions on issues of concern, share policy perspectives and seek assistance on state and local issues." As a state legislator, Nestande attends to several federal issues, such as federal land holdings in his district and state budget issues impacted by the federal budget. *Id.*

Unlike the alleged exploratory expenditures, however, the Response does not address the allegation that a State Campaign Committee mailer appeared on the Federal Committee's website.

B. Legal Analysis

Under the Act, a federal candidate or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of that candidate is prohibited from soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office that are not subject to the limits, prohibitions, and reporting requirements of the Act.

2 U.S.C. § 441i(e). California law allows state candidates to accept up to \$4,100 per election from individuals, corporations, and labor unions. Cal. Gov't. Code §§ 18545, 82047, 85301.

Thus, contributions made to Nestande's California state committee are not subject to the limits and prohibitions of the Act. *See* 2 U.S.C. §§ 441a(s)(1), 441b. Furthermore, Commission regulations prohibit the transfer of funds or assets from a candidate's nonfederal campaign committee to his or her federal principal campaign committee. 11 C.F.R. § 110.3(d).

1. Testing the Waters Activities

Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not considered contributions or expenditures under the Act. 11 C.F.R. §§ 100.72, 100.131. These funds are, however, subject to the limitations and

1 prohibitions of the Act, and the individual is required to keep records of them. *Id.* If the
2 individual becomes a candidate, the funds become contributions and expenditures, and are
3 subject to the reporting requirements of the Act. *Id.* As such, the Commission has previously
4 considered funds spent by a state candidate's campaign committee for the purpose of exploring
5 federal candidacy to be a transfer from the state committee to the subsequent candidate's federal
6 committee. *See Factual & Legal Analysis* at 4-5, MUR 6267 (Jonathan Paton for Congress);
7 *Factual & Legal Analysis* at 2-6, MUR 5480 (Levetan for Congress).⁵

8 In this matter, however, the available information "does not provide a basis for
9 proceeding with the matter" because "it fails to give rise to a reasonable inference that a violation
10 occurred." *See Statement of Policy Regarding Commission Action in Matters at the Initial Stage*
11 *in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (hereafter, "Statement
12 of Policy"). The Complaint's allegation that such a transfer of funds occurred is speculative and
13 denied by the Respondents, and the Respondents provided detailed information sufficiently
14 indicating that no violation occurred. *See* MURs 6474/6534 (Citizens for Josh Mandel).⁶ First,
15 the Complaint notes the \$13,861 spent by the state committees on campaign consulting services
16 — including services provided by a group based in the Washington, D.C. area not previously
17 used by the state committees. *Compl.* at 3. As to those expenditures, the Response asserts that
18 the consultants provided services related to "state political and legislative advice and research"
19 and other officeholder duties. *Resp.* at 2. Second, the Complaint alleges that the state

⁵ In both of these matters, the Commission found reason to believe that the candidate, the state campaign committee, and the federal campaign committee violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 100.3(d) based on the state campaign committee's payment for polling that benefited the testing the waters phase of the candidate's federal candidacy. *See id.*

⁶ In MURs 6474 and 6534, the Commission found no reason to believe that the candidate, the state campaign committee, and the federal campaign committee violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) where the complaint's allegation that the state campaign committee paid for the candidate's testing the waters travel was speculative and specifically denied by the respondents, and the respondents provided sufficient details concerning the travel to show that it did not include federal campaign or testing the waters activity. *Factual & Legal Analysis* at 8, MURs 6474/6534.

1 committees spent \$16,649 for radio production and air time costs, asserting that these
2 expenditures constitute the first time the state committee incurred radio expenses in a non-
3 election year. Compl. at 3. However, the state committees' statements disclose only \$9,000 in
4 radio expenses during the relevant period, *see supra* p. 4, and the Response asserts that these
5 expenditures were made for the purpose of promoting state legislation and did not refer to
6 Nestande as a potential or actual candidate for federal office. Resp. at 2. Third, the Complaint
7 notes the \$2,928 in expenditures for a trip to Washington, D.C., just prior to the filing of
8 Nestande's Statement of Candidacy. Compl. at 3. As to these expenditures, the Response
9 asserts that the trip was made for the purpose of championing state and local issues affected by
10 federal legislation. Resp. at 2.

11 The Complaint also notes that the state committees spent \$8,293 for voter registration
12 activities. Compl. at 3. Such activities are not inherently federal campaign activities — to the
13 contrary, the Act considers voter registration activity to be federal election activity only when it
14 occurs within 120 days before a regularly scheduled federal election. 2 U.S.C. § 431(20)(A)(i).
15 The voter registration activity in this matter occurred in April and May of 2013 — more than a
16 year before the 2014 general election. Furthermore, there is no information to suggest that it was
17 undertaken for the purpose of exploring a potential federal candidacy.

18 Similarly, the Complaint's allegation that the state committees' high level of spending as
19 a whole — during a non-election year preceding Nestande's federal candidacy — indicates that
20 the state committees were supporting Nestande's federal candidacy, Compl. at 3, is not supported
21 by any information, other than what has been addressed above, that would give rise to a
22 reasonable inference that a violation occurred. *See* Statement of Policy at 12,546.

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1 Accordingly, we recommend that the Commission find no reason to believe that
2 Respondents violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding the alleged
3 exploratory activity.

4 2. State Campaign Mailer

5 Respondents do not address, let alone deny, the Complaint's allegation that a PDF of a
6 State Campaign Committee mailer appeared on the Federal Committee's website for several
7 months. It thus appears that the State Campaign Committee transferred an asset to the Federal
8 Committee, and thus made an in-kind contribution to the Federal Committee. See F&LA at 9,
9 MURs 6474/6534 (characterizing a newsletter about the candidate on his federal committee
10 website as a potential in-kind contribution); Factual & Legal Analysis at 4, MUR 5636 (Russ
11 Diamond) (characterizing state campaign website containing information about policy positions
12 and references to both state and federal campaigns as an asset shared between state and federal
13 committees).

14 The value of this transferred asset, however, would likely be *de minimis*. Although the
15 mailer extols Nestande's positive qualities as a leader, it promotes his state candidacy rather than
16 his federal candidacy. See Compl., Attach. In fact, it appears to be an artifact from his 2012
17 state candidacy and makes no reference to his federal candidacy whatsoever. *Id.* Accordingly,
18 we recommend that the Commission exercise its prosecutorial discretion and dismiss the
19 allegation that Respondents violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding
20 the campaign mailer, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

21 3. Reporting Requirements

22 The Complaint alleges that the Federal Committee failed to disclose the alleged
23 contributions from the state committees. Compl. at 6. Political committees are required to
24 disclose all contributions, including in-kind contributions, from persons other than political

committees. 2 U.S.C. § 434(b)(2)(A); 11 C.F.R. § 100.52(d)(1). Accordingly, if the Federal Committee had accepted a transfer of funds or assets from either state committee, it should have disclosed those assets as in-kind contributions.

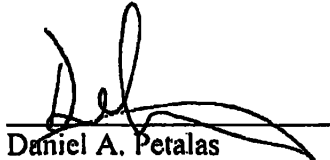
As discussed above, however, it does not appear that either state committee transferred funds or assets to the Federal Committee for testing the waters activities. Additionally, although the Federal Committee should have disclosed the transfer of the mailer that appeared on its website, the value of this transfer, and thus the amount to be reported, is most likely *de minimis*. Accordingly, we recommend that the Commission dismiss the allegation the Federal Committee violated 2 U.S.C. § 434(b).


III. RECOMMENDATIONS

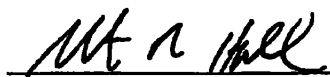
1. Find no reason to believe that Brian Nestande; Nestande for Assembly 2012; Brian Nestande Officeholder Committee, Assembly 2012; and Nestande for Congress and David Bauer in his official capacity as treasurer violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding Nestande's alleged exploratory activity.
2. Dismiss, as a matter of prosecutorial discretion, the allegation that Brian Nestande; Nestande for Assembly 2012; and Nestande for Congress and David Bauer in his official capacity as treasurer violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding the state campaign mailer.
3. Dismiss the allegation that Nestande for Congress and David Bauer in his official capacity as treasurer violated 2 U.S.C. § 434(b).
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.

6. Close the file.

May 13, 2014
Date


Daniel A. Petalas
Associate General Counsel


Mark Shonkwiler
Assistant General Counsel


Margaret R. Howell
Attorney

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